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MICHAEL RODAK, JR.,

in the Supreme Court of the United States

October Term, 1973

No. 73-5641

TERRY EUGENE SAVAGE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, entered on July 23, 1973.

THE OPINION BELOW

The United States Court of Appeals for the Fifth Circuit, affirmed the conviction below on April 17, 1972. That opinion was reported in 459 F.2d 60 (5 Cir., 1973) (App. A). On July 23, 1973, the United States Court of Appeals for the Fifth Circuit vacated its judgment and entered a new judgment reaffirming the judgment of conviction and appointing counsel for the appellant. The opinion was rendered but not yet reported. (App. B).

JURISDICTION

The judgment of affirmation of the United States Court of Appeals for the Fifth Circuit was pronounced on July 23, 1973. Jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C.A. §1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fifth Circuit correctly determined that there was a voluntary consent to search given by the petitioner of his residence.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon

probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Southern District of Florida, Petitioner was convicted on two counts charging bank robbery violations (18 U.S.C. §2113(a) and 2; 18 U.S.C. §2113(d) and 2. Petitioner was sentenced to a total of 15 years imprisonment. Two co-defendants were found not guilty.

Appeal was taken to the United States Court of Appeals for the Fifth Circuit and on April 17, 1972, the conviction was affirmed. Subsequently, a motion to vacate judgment and sentence pursuant to 28 U.S.C. §2255 was denied by the trial court and appeal filed to the United States Court of Appeals for the Fifth Circuit. On July 23, 1973, the United States Court of Appeals found no error in the District Court's denial of the motion to vacate; however, the judgment of April 17, 1972, was vacated and a new judgment entered reaffirming the judgment of conviction on the ground that the defendant was denied his right to petition for certiorari to the Supreme Court of the United States. Counsel was appointed to file this petition for certiorari by the United States Court of Appeals for the Fifth Circuit.

On June 7, 1971, the Peoples' National Bank of Commerce in Miami, Florida, was robbed at approximately 9:45 A.M. Shortly before noon, three F.B.I. Agents and a civilian arrived at a house occupied by the Petitioner SAVAGE (a/k/a Timothy Robins) and were admitted by

him after identifying themselves. When the Agents entered, they observed another male sitting on the floor in the living room area. There was a commotion outside and two of the Agents (Lawson and Rivero) exited, leaving Agent Spero inside the house with the two subjects and the other individual who had arrived with the F.B.I. Agents. The Agent remaining in the house (Spero) took out his revolver and held it to his side. Shortly thereafter other Agents came inside the house.

An Agent gave the Petitioner SAVAGE an advice of rights form, told him to read it and if he had any questions, ask. There were no questions asked. The Petitioner signed the form using the name Timothy Robins. (App. C). The Agent then asked the Petitioner who owned the house to which the Petitioner responded affirmatively. Petitioner was then asked for permission to search and was given a form to sign by the Agent. Petitioner asked if the Agents could get a search warrant and the Agents said they probably could. The form was then signed and the search commenced. (App. D).

At the time of the signing of the two forms, there were at least three F.B.I. Agents present in the room with the Petitioner and a total of at least five Agents in the small house, the living room of which was approximately 12 by 18 feet. Several other Agents and Deputy Sheriffs were outside around the house.

A pretrial motion to suppress was denied and after conviction, the United States Court of Appeals for the Fifth Circuit found that there was a valid consent to search given by the Petitioner.

ARGUMENT

Petitioner submits that the seizure of items from his house by Government Agents violated the search and seizure provisions of the Fourth Amendment to the United States Constitution in that the consent to search was obtained by coercion and was not voluntary.

In *Schneckloth v. Bustamonte*, No. 71-732 (Supreme Court of the United States, May 29, 1973), this Court held that the voluntariness of a consent must be determined by the totality of the circumstances and:

> ". . . account must be taken of subtle coercive police questions, as well as the possibly vulnerable subjective nature of the person who consents." *Schneckloth*, supra.

It must be recognized that the Petitioner SAVAGE admitted three F.B.I. Agents to his house after they identified themselves and said they wanted to ask him a few questions. This fact is not indicative of cooperative consensual action on the part of the Petitioner in view of the decision in *Laverne v. Corning*, 316 F.Supp. 629 (N.Y., 1970) and cases cited therein:

> "Even assuming, as defendant suggests, that one of plaintiff's agents allowed three of the defendants to enter after being informed as to who they were, this is merely a submission to the power of public authority and not a consent. Johnson v. United States, 333 U.S. 10, 13, 68 S.Ct. 367, 92 L.Ed. 436, (1948); People v. Laverne, supra, 251 N.Y.S. 2d at 454, 200 N.E.2d 441."

It is submitted that the number of officers present inside of the house and around the outside of the house is material and bears on the coercive nature of the entire situation as was recognized in *Harless v. Turner*, 456 F.2d 1337 (10 Cir., 1972), wherein the Court held there was not a legally effective consent in view of four or five police officers arriving at the home of the defendant early in the morning with two of the officers entering the house and getting the defendant and his wife out of bed. As the defendant was being taken out to the patrol car, he was asked for his consent for the search of his automobile to which he agreed. The Court in *Harless*, supra, found "coercion necessarily flowing from the presence of a number of sheriff's officers."

Not only do we have a situation where a number of officers arrived at the Petitioner's house, but when two of the Agents left the living room area momentarily to go outside, the remaining Agent pulled out his gun despite the fact that the testimony from the Agents was clear that neither the Petitioner nor anyone else in the room had been placed under arrest.

The Fifth Circuit Court of Appeals in affirming the conviction and finding the consent to be voluntary, relied on the decision in *United States v. Curiale*, 414 F.2d 744 (2d Cir., Page 1969), cert. denied, 396 U.S. 959, 90 S.Ct. 433, 24 L.Ed.2d 424 (1969). It is the Petitioner's view that clearly the facts in *Curiale*, supra, are distinguishable as indicated by the testimony of the F.B.I. Agent quoted in the opinion as follows:

> "Mr. Curiale read the form, which I presented to him. After reading it, he looked at me and made

> a remark, 'If I don't sign this, you are going to get a search warrant.' At that point, I stopped him and said, 'I don't want you to sign on that basis. If you are going to sign it, do it voluntarily.' He just looked and signed it."

In the *Curiale* case, there is a specific admonishment by the Agent that if Curiale was going to consent, it had to be voluntary and that it was not to be on any other basis. Under our present set of circumstances, the Petitioner and the other individuals present in the house were first given an advice of rights form which was not read to them but they were told to read it and if they had any questions, to ask. There was no specific admonishment as to their "Miranda rights" and there was no clear indication that they intelligently understood those rights before signing the form.

The consent to search form was then given to the Petitioner after he acknowledged he owned the house and again there was no specific admonishment by the Agent as to Petitioner's rights or what was contained on the form and its legal meaning.

It is difficult to understand how a "clear and unequivocal consent" can be inferred from the Petitioner's action in responding "What's the use?" when advised by the Agent that they probably could get a search warrant. It is no more than submission to apparent lawful authority.

There is little difference between the situation presented to Petitioner and the situation in *Bumper v. State of North Carolina*, 391 U.S. 543, 88 S.Ct. 1788 (1968)

wherein this Court held that a search cannot be justified on the basis of a lawful consent after the officer falsely stated that he possessed a warrant. The situation presented to this Court by the Petitioner herein involves an officer stating that a search warrant probably could be obtained. That is more closely related to *Bumper* than the *Curiale* case, supra, wherein the Agent did not acknowledge whether or not a search warrant could be obtained but immediately stopped the suspect from signing the form until he understood that the signing had to be voluntary of his own free will and volition. There were no such admonishments given b ythe Agent in the case being presented for review.

It is submitted that the *Curiale* case can be distinguished on further grounds. In *Curiale*, subject was informed that he was under investigation and the investigating officers asked Curiale to accompany them to the police station. At the police station, he was given a printed form setting forth Miranda admonishments. After Curiale signed the form, the investigating officer *advised Curiale that he was not under arrest and was free to leave.* After some discussion with Curiale, the officer advised that he would like to search a premises owned by Curiale and at this point a consent to search form was given to Curiale which he signed and then accompanied the officers to the building to be searched.

In the instant case, Petitioner SAVAGE was never informed that he was not under arrest and free to leave. It can be anticipated that by the Agent standing with his gun in his hand while he was alone with the subjects, the contrary is true. Also, the premises to be searched was

SAVAGE's house which the Agents had entered, leaving SAVAGE little choice in the matter in view of the number of Agents in the house and around the outside.

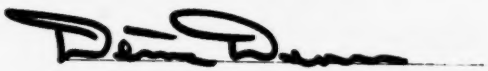
The Government did not establish that the consent to search by SAVAGE was freely and voluntarily given and not the result of expressed or implied coercion under the totality of circumstances.

CONCLUSION

For the above and foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DENIS DEAN
Attorney for Petitioner



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has, pursuant to Rule 33(1) of the Rules of the Supreme Court of the United States, been served by mail upon WILLIAM R. NORTHCUTT, Esquire, Assistant United States Attorney, 300 Ainsley Building, Miami, Florida, by mail, this 17 day of October, 1973.

APPENDIX A

[TITLE OMITTED]

Opinion of the
United States Court of Appeals,
Fifth Circuit.

April 17, 1972.

Before WISDOM, GODBOLD and RONEY, Circuit Judges.

PER CURIAM:

[2] The defendant executed a consent form giving permission for search of his residence without a warrant. The form included an acknowledgement by the signatory that he had been informed of his right not to have the premises searched without a warrant, that he was aware of such right to refuse to consent, and that he gave his permission voluntarily and without threats or promises. The consent was not rendered involuntary by reason of the fact that before signing the form the defendant asked the police officer if the officer could get a search warrant and the officer replied "Yes, we probably can." The officer's statement was in response to defendant's inquiry, and it was not a misrepresentation of the facts. United States v. Curiale, 414 F.2d 744 (2d Cir.), cert. denied, 396 U.S. 959, 90 S.Ct. 433, 24 L.Ed.2d 424 (1969).

[3] Nor are ye persuaded that the defendant's will was overborne by the presence of a number of FBI agents and police officers at his residence when the defendant executed the consent form. Though some of those present did possess firearms, there is no indication in the record that the weapons were handled in a threatening manner. The district court concluded that, considering all the circumstances surrounding Savage's consent, including the number of law enforcement personnel, the consent was valid. This finding was not "plainly erroneous, which is our scope of review of facts found at a motion to suppress hearings." United States v. Resnick, 455 F.2d 1127 [5th Cir., 1972].

Affirmed.

APPENDIX B

[TITLE OMITTED]

Opinion of the
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(July 23, 1973)

Before WISDOM, AINSWORTH and CLARK,
Circuit Judges.

PER CURIAM: This is an appeal from the denial of a motion to vacate judgment and sentence, filed pursuant to the provisions of 28 U.S.C. §2255.

We find no error in the district court's denial of relief concerning Appellant Savage's allegations of trial court errors and ineffective assistance of counsel. However, Savage's court-appointed counsel failed to file a petition for certiorari in the Supreme Court after we affirmed his conviction on direct appeal, United States v. Savage, 459 F.2d 60 (5th Cir., 1972), despite the fact that it now appears his counsel promised Savage that this would be done.[1]

[1]The Appellant attached to his brief a Xerox copy of a letter addressed to him from his court-appointed counsel to this effect, in support of the allegation made in his § 2255 motion.

In a recent case very similar on its facts, we took action to accord the appellants their right to petition the Supreme Court for certiorari. Lacaze v. United States (457 F.2d 1075 (5th Cir. 1972). That is what we now do in this case by recalling our mandate in Savage's direct criminal appeal cited above and by simultaneously issuing a new mandate reaffirming our prior affirmance of the judgment of conviction. Appellant Savage is hereby advised of his renewed right to petition the Supreme Court for certiorari to review this Court's affirmance of his direct appeal. Since the appellant has proceeded without counsel in this forma pauperis appeal, we also appoint counsel to assist him in prosecuting his application for certiorari.

The original judgment of this Court on direct appeal is vacated and a new judgment is entered reaffirming the judgment of conviction, and counsel is appointed for the appellant.

APPENDIX C

INTERROGATION; ADVICE OF RIGHTS
YOUR RIGHTS

Place Miami, Florida

Date 6/7/71

Time 12:20

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

App. 6

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed /s/ Timothy Robins

Witness: /s/ H. Charles Bell

Witness: /s/ A. Frank Spero

Time: 12:21 P.M.

APPENDIX D

6/7/71

(Date)

2262 N.W. 80th

(Location)

I, TIMOTHY ROBINS, having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize H. CHARLES BELL, and JESUS HOMERO RIVERO, Special Agents of the Federal Bureau of Investigation, United States Department of Justice, to conduct a complete search of my premises located at 2262 N.W. 80th. These agents are authorized by me to take from my premises any letters, papers, materials or other property which they may desire.

This written permission is being given by me to the above-named Special Agents voluntarily and without threats or promises of any kind.

(SIGNED)

WITNESSES:

/s/ H. Charles Bell

/s/ A. Frank Spero

/s/ Timothy Robins

SUPREME COURT, U. S.

FEB 2 1

MICHAEL RODAK, J

No. 73-5641

In the Supreme Court of the United States

OCTOBER TERM, 1973

TERRY EUGENE SAVAGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5641

TERRY EUGENE SAVAGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his written consent to a search of his residence was not voluntary.

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of two counts of bank robbery, in violation of 18 U.S.C. 2113 (a) and (d) and 18 U.S.C. 2. Two co-defendants were found not guilty.

Petitioner was sentenced to a ten-year prison term on count one and a fifteen-year prison term on count two. The trial court thereafter vacated the judgment as to count one. The court of appeals affirmed (Pet. App. A).

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Petitioner then filed a motion to vacate the judgment under 28 U.S.C. 2255, which was denied by the trial court. The court of appeals found no error in the district court's denial; however, the original judgment was vacated and a new judgment entered reaffirming the judgment of conviction in the criminal case. This was done to enable petitioner to petition for a writ of certiorari, which his court-appointed counsel had promised but failed to do (Pet. App. B).

Immediately after the Peoples National Bank of Miami, Florida, had been robbed of some $74,000 by armed men who had struck and injured a guard, Federal Bureau of Investigation agents obtained information linking petitioner to a car used in the robbery. Agents Lawson, Spero and Rivera were taken to petitioner's house by Eddie Smart, the owner of the car, who said he had loaned it to petitioner. When petitioner answered the door the agents identified themselves and told him that they were investigating a bank robbery and wanted to ask him questions regarding the location of Smart's car (M.S. I 14; Tr. 284).[1] Petitioner agreed and stepped back, allowing the agents and Smart to enter (Tr. 285).

Within twenty seconds a disturbance occurred outside, and Agents Lawson and Rivera ran out (M.S. I 17; Tr. 206, 286). Agent Spero testified that he was left alone inside the house with petitioner, co-defendant Montue Oliver, and Eddie Smart. A knife was open

[1] "M.S. I" refers to the transcript of the suppression hearing on August 6, 1971, and "M.S. II" refers to the transcript of the August 9, 1971 suppression hearing, both of which are bound as one volume. "Tr." refers to the transcript of the trial.

at Oliver's side (M.S. II 18–19). Spero, who said that he felt in danger because he knew that a bank guard had been pistol-whipped and that a gun was fired in the bank, drew his revolver and held it at his side (Tr. 287–288).

Within minutes, Agent Bell arrived. Agent Bell advised both Oliver and petitioner fully of their *Miranda* rights. Both men were given "advice of rights" forms, which they signed (Tr. 308; M.S. I 44–45; Pet. App. C). After petitioner said he rented the house, Agent Bell told him that they would like permission to search the house, but that petitioner did not have to agree (M.S. I 57–58). Petitioner asked the agent if he could get a search warrant. Bell told him that he could, but that he would have to see the United States Attorney (Tr. 314; M.S. I 58). Petitioner then signed a "Consent to Search" form (Gov. Ex. 19; Tr. 309; Pet. App. D). There were a number of law enforcement personnel in and about the house when the consent form was signed. Thereafter, the agents searched the house and found a driver's license, key, rental agreement, and sketch of the bank (M.S. I 65, 69).

Petitioner's contention that his consent to search the house was not voluntary is without merit. The search was made only after petitioner had signed a consent form which stated specifically that he had the right to refuse to consent to the search. The form also stated that permission to search was being given voluntarily and without threats or promises of any kind (Pet. App. D). Prior to this, petitioner had been advised of

his *Miranda* rights and had signed a form to that effect. He had also been told that he did not have to consent to the search. As the court below held, no misrepresentations were made by Agent Bell to induce petitioner to consent to the search,[2] in contrast to *Bumper* v. *North Carolina,* 391 U.S. 543, on which petitioner relies. As the court of appeals properly noted, "[t]he officer's statement was in response to defendant's inquiry, and it was not a misrepresentation of the facts" (Pet. App. A 1).

Nor is there any evidence that the number of law enforcement agents in the house coerced petitioner to sign the consent form. The finding of the district court that in the setting of this case there was voluntary consent was properly upheld by the court below, and there is no occasion for further review by this Court.

It is therefore respectfully submitted that petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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[2] As Bell testified (M.S. I. 58):

"* * * I told him that we would like permission to search the residence. And he was the owner and he could give us the permission; that he did not have to give us the permission to search.

"He then asked me if we could get a search warrant and I told him we could, that we would have to see the U.S. Attorney. And he said, 'Well if you can get one, then why shouldn't I sign the form?' And he signed the form and we conducted the search."

U.S. GOVERNMENT PRINTING OFFICE: 1974